



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 5, 1997

Ms. Sandra C. Joseph  
Open Records Counsel/Disclosure Officer  
Texas State Comptroller's Office  
111 East 17th Street  
Austin, Texas 78774

OR97-2667

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 109870.

The Comptroller's Office (the "comptroller") received a request for the following information: "1. All 3" concrete and 2" asphalt paving costs data, research, or surveys for pours greater than 3,000 sf collected by the PTD staff from January 1, 1997 to July 21, 1997. 2. All worksheets showing specific adjustment factors and formulas used by the PTD to develop costs for 3" concrete and 2" asphalt in the 1996 PVS." You assert that some of the requested information, specifically installation cost data for the concrete and asphalt paving improvements to real property, is excepted from public disclosure under section 552.103 of the Government Code. We have considered your argument and reviewed the information submitted.

Initially, we note that you did not submit your request for a decision from this office within ten business days of your receipt of the request for information. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within ten days following the governmental body's receipt of an open records request. *See Gov't Code § 552.301(a)*. This office usually will not consider an exception raised after the initial ten days unless there exists a compelling reason for doing so. Open Records Decision No. 515 (1988) at 6.

You inform us that, on July 28, 1997, the date on which the comptroller responded to the requestor by notifying her that the comptroller was in the process of complying with her request, "we had no indication of any kind that litigation was contemplated or reasonably anticipated." You also inform us that while you were "collecting the information" to be disclosed, your office was served with a petition. Moreover, the requestor in this matter is with the law firm that has filed the lawsuit against the comptroller.

Based on the specific facts presented in this case, we find the comptroller has demonstrated a compelling reason to overcome the presumption of openness. Therefore, this office agrees to consider the applicability of section 552.103 to the information being requested. In arriving at this decision, we assume good faith on the part of the comptroller in taking a reasonable amount of time to collect the responsive information. See Gov't Code § 552.228(a) ("it shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested."); Open Records Decision No. 467 (1987) (governmental body may take reasonable amount of time to comply with request for public information; what constitutes reasonable period of time depends on facts in each case, but volume of information requested is highly relevant).

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party, and is intended to prevent the use of the Open Records Act as a method to avoid the rules of discovery. Open Records Decision No. 551 (1990). The comptroller has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The comptroller must meet both prongs of this test for information to be excepted under section 552.103(a).

You have submitted a petition filed in the lawsuit *Lake Worth Independent School District, et. al v. Texas Comptroller of Public Accounts*, cause no. 9708882 filed in Travis County District Court. The comptroller has therefore met its burden under the first prong of the litigation exception. Upon review of the information submitted, we conclude it is related to the pending litigation and thus, it may be withheld from disclosure under section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 109870

Enclosures: Submitted documents

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(w/o enclosures)